

STATE OF MICHIGAN
COURT OF APPEALS

LORILLARD TOBACCO COMPANY,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

UNPUBLISHED

September 16, 2014

No. 313256

Court of Claims

LC No. 11-00093-MT

Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

In this tax appeal, plaintiff appeals as of right from an order of the Court of Claims granting summary disposition to defendant. This appeal was held in abeyance pending our Supreme Court's decision in *IBM v Dep't of Treasury*, ___ Mich ___; ___ NW2d ___ (Docket No. 146440, issued July 14, 2014). We reverse and remand for proceedings consistent with this opinion.

Plaintiff, a multistate business entity organized in Delaware, paid \$3,381,000 in business income tax to the State of Michigan for the period in dispute (ending in December of 2008). In its Michigan Business Tax return filed in 2009, plaintiff elected to use the three-factor (sales, property, and payroll) apportionment formula provided for by the Multistate Tax Compact Act, MCL 205.581 (the Compact) to calculate its business income tax. In its return, plaintiff sought a refund of \$1,249,821 for overpaid taxes. Defendant denied that plaintiff could make that election under the Compact, contending that the adoption of the Michigan Business Tax Act, MCL 208.1101 *et seq.* (BTA), required multistate companies such as plaintiff to allocate its taxes using the sales-factor apportionment formula provided for in the BTA. Defendant issued a final tax bill assessing the following additional amounts for plaintiff's failure to allocate: (1) \$64,204 in additional taxes due; (2) \$16,051 in penalties; and (3) \$5,790.76 in interest. Plaintiff disagreed and sued for a refund of all overpaid taxes, penalties, and interest. Relying upon the mandatory language in the BTA, the Court of Claims held that plaintiff was no longer allowed to elect to use the apportionment formula provided for by the Compact.

Plaintiff argues that the Court of Claims erred in granting defendant's motion for summary disposition because plaintiff was permitted to use the Compact's three-factor apportionment formula to apportion its business income tax. Because the recent outcome of *IBM* is dispositive on this issue, we agree with plaintiff.

“We review de novo a decision of the Court of Claims on a motion for summary disposition.” *IBM*, ___ Mich at ___; slip op at 4. “We also review de novo issues of statutory interpretation.” *Id.* at ___; slip op at 4.

The Compact allows multistate taxpayers to allocate its tax liability as follows:

(1) Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in 2 or more party states may elect to apportion and allocate his income in the manner provided by the laws of such state or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with [the Compact’s three-part allocation election] [MCL 205.581, art III.]

“This provision allows a taxpayer subject to an income tax to elect to use a party state’s apportionment formula or the Compact’s three-factor apportionment formula.” *IBM*, ___ Mich at ___; slip op at 11. In contrast, the BTA requires multistate taxpayers to apportion as follows:

(1) Except as otherwise provided in this act, each tax base established under this act shall be apportioned in accordance with this chapter.

(2) Each tax base of a taxpayer whose business activities are confined solely to this state shall be allocated to this state. Each tax base of a taxpayer whose business activities are subject to tax both within and outside of this state shall be apportioned to this state by multiplying each tax base by the sales factor calculated under section 303. [MCL 208.1301.]

“Under the statute, a taxpayer’s BTA tax base must be apportioned through the BTA’s sales-factor apportionment formula.” *IBM*, ___ Mich at ___; slip op at 11.

The outcome of *IBM* is dispositive on the issue of whether plaintiff could elect to use the three-factor apportionment formula under the Compact. In *IBM*, the taxpayer elected to apportion its business income tax and modified gross receipts tax using the three-factor apportionment formula pursuant to the Compact’s election provision. *Id.* at ___; slip op at 2-3.¹ The defendant denied the apportionment because it determined that the taxpayer could not elect to use the Compact formula, and was required to use the sales-factor formula under the BTA. *Id.* at ___; slip op at 2-3. The Court of Claims granted summary disposition for the defendant. *Id.* at ___; slip op at 3. In an unpublished opinion, the Court of Appeals held that because there was a facial conflict between the BTA’s mandatory sales-factor formula and the Compact’s three-factor apportionment formula, the Legislature had repealed by implication the Compact’s

¹ We note that in the current case, plaintiff only apportioned its business income tax using the three-factor apportionment formula, but did not apportion its modified gross receipts using the three-factor apportionment formula. Despite this small factual distinction, we hold that *IBM* still applies and controls on this issue.

election provision.² *Id.* at ____; slip op at 3-4. The Michigan Supreme Court reversed. In its lead opinion, the Court recognized that the BTA used mandatory language requiring multistate taxpayers to use the sales-factor apportionment formula. *Id.* at ____; slip op at 11. However, the Court ultimately rejected the defendant's claim that the BTA's mandatory language precluded the use of any other apportionment formula, and, thus, impliedly repealed the Compact. *Id.* at ____; slip op at 17. The Court, after noting that implied repeals are strongly disfavored such that courts must make every attempt to avoid construing statutes as conflicting, found that the Compact and the BTA were compatible when read *in pari materia*.³ *Id.* at ____; slip op at 11, 14-15. The Court emphasized the importance of looking at the history and purpose of the legislation, and reasoned: (1) predecessor tax acts included mandatory language similar to the language in the BTA, (2) the BTA's mandatory apportionment language may be read as compatible with the Compact's election provision, (3) the legislature did not expressly repeal the Compact, and (4) a review of both statutes shows a uniform and consistent purpose. *Id.* at ____; slip op at 11-15. For these reasons, the Court found that a reasonable construction existed other than repeal by implication, in that the BTA's apportionment requirement is only mandatory if the taxpayer does not elect to use the Compact's formula. *Id.* at ____; slip op at 15. The Court also found it noteworthy that the Legislature subsequently repealed the Compact's election provision in 2011,⁴ inferring that the Legislature never intended to impliedly repeal the Compact when it ratified the BTA. *Id.* at ____; slip op at 16-17. Accordingly, the Legislature did not impliedly repeal the Compact's election provision and the plaintiff was able to elect to use the three-factor apportionment formula. *Id.* at ____; slip op at 17.

As *IBM* is binding on this Court and dispositive of the appeal,⁵ we hold that the trial court erred in granting summary disposition to defendant because plaintiff was entitled to use the Compact's allocation formula provided by MCL 205.581.

Plaintiff also argues that it is entitled to waiver of all penalties assessed by defendant. We agree. Taxpayers are subject to penalties if the "taxpayer fails or refuses to file a return or pay a tax administered under this act within the time specified." MCL 205.24(1). Because plaintiff correctly reported its income under the three-factor apportionment formula, it did not fail to pay a tax and was therefore not subject to penalties.

² *IBM v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 (Docket No. 306618).

³ "Statutes that address the same subject matter or share a common purpose are *in pari materia* and must be read collectively as one law, even when there is no reference to one another." *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 472; 838 NW2d 736 (2013).

⁴ On May 25, 2011, the legislature amended MCL 205.581, Art III(1) to provide that beginning January 1, 2011, any taxpayer subject to the BTA or the income tax act shall apportion taxes pursuant to the BTA, and not pursuant to the Compact. *IBM*, ____ Mich at ____; slip op at 16; 2011 PA 40.

⁵ Because the holding from *IBM* resolves this issue on appeal, we do not address plaintiff's additional argument that the Compact prevails over the BTA because it was created by contractual agreement between member states.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, the prevailing party, may tax costs. MCR 7.219.

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder

/s/ Karen M. Fort Hood